2

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CANTON INSURANCE OFFICE, LIMITED, a corporation, THE YANG-TSZE INSURANCE ASSOCIATION, a corporation,
Appellants,

vs.

INDEPENDENT TRANSPORTATION COMPANY, a corporation, THE CHINA TRADERS INSURANCE COMPANY, a corporation,
Appellees.

No. 2332

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLANTS

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STATEMENT OF CASE.

The appellants, together with appellee China Traders Insurance Company, were respondents below; against each of whom appellee Independent Transportation Company recovered severally. The China Traders Insurance Company declined to join

in this appeal upon summons and severance duly served upon it by appellants, and was therefore named as appellee in the subsequent notice of appeal, citation, etc., in the proceedings for securing a review by this court. As the appellee China Traders Insurance Company has not appeared herein or otherwise appealed from the decree recovered against it, and is thus only a nominal party to this review, wherever the word "appellee" is used herein, it will be understood to refer to the libellant below, the Independent Transportation Company, unless otherwise expressly stated.

I.

The question of appellee's ownership of the VASHON is not raised here. In July, 1907, the appellants issued to appellee their several policies (Exhibits "G" and "H") Hull Time, San Francisco form, on the steamer VASHON then sixteen years old and recently acquired and owned by appellee.

Each policy in addition to bearing an endorsement on its face as follows:

(a) "Warranted employed in the general freighting and passenger business on Puget Sound within a radius of 30 miles from Seattle."

contained the following clauses in the body thereof, to-wit:

(b) "3d. Touching the adventures and perils which this Insurance Company is contented to bear and takes upon itself in this policy they are of the seas, * * * and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which Insurers are liable by the Rules and Customs of Insurance in San Francisco including the rules for Adjustment of Losses *printed on the back hereof,* and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this policy."

(c) "8th. It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by perils insured against (except on anchors, copper and calking under the copper) as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage and their proceeds deducted from the gross loss.

and further contained Rules for Adjustment of Marine Losses printed on the back thereof, *inter alia,* the following, to-wit:

(d) "*Rule VI. Surveys.* The insurers shall not be obliged to accept any adjustment on a vessel based upon a survey which omits to discriminate between the repairs attributable only to the perils insured against, and such repairs as are due only to wear and tear or to the original defects, natural decay, or depreciation of the vessel.

(e) "*Rule VII. Bills for Repairs.* When bills for repairs are presented, which include items indifferently specified, chargeable partly to owners and partly to underwriters, and having no reference to discrimination in the survey, the adjuster shall require the claimant or master to separate the charges in accordance with the survey. Failing wherein, the adjuster shall refer the bill back to the maker thereof, with a request to separate the items, so as to correspond with the survey. Failing in both, it shall be the custom to charge the whole of the unspecified items to the "owners" column.

(f) "*Rule IX. Appointment of Surveyors and Appraisers.* In all cases of average, whether General or Particular, whether on Hull or Cargo, the selection and appointment of Surveyors and Appraisers shall be agreed upon beforehand by and between the insured or claimants in average, or their representatives on the one side, and the representatives of the insurers on the other; and the services of the persons so appointed shall be understood to be wholly disinterested as between all parties concerned. No representatives of Underwriters shall be expected to certify, approve, or accept any surveys or appraisements made in contravention of this rule; but such documents shall be deemed to be wholly *ex parte* in character, and, as such, open to criticism, or liable to be rejected altogether. In no case shall any ship-carpenter, rigger, or other mechanic who may have served on a survey, be employed to make the repairs or any portion thereof."

II.

The vessel, at the time of placing the insurance, was running from Seattle across Seattle Harbor to Alki Point, carrying mostly passengers; she continued in that business after the insurance was taken out, until some time in the following August, when she was laid up and moored at the King Street dock, Seattle Harbor, and there she remained until the 3d of December following, when she was taken directly from her berth at King Street dock into and up the Duwamish River emptying into Seattle Harbor and there moored, laid up for the winter, out of commission, her master and crew discharged, and her care and custody entrusted to a river boatman living on the bank of the river adjacent to where the vessel was moored.

On December 15th following, the vessel filled with water and sank at her moorings. At the request of appellee, Captain Gibbs and Mr. Frank Walker at once took charge of salvage operations; the vessel was floated January 11, 1908, hauled out and cleaned February 12, 1908; on April 15, 1908, the survey of the vessel was completed, and an attempt made by appellee to abandon the vessel to appellants by service of an alleged notice of abandonment; abandonment was declined by appellants

on April 17, 1908; subsequently, on April 20, 1908, proofs of loss were submitted by appellee to appellants; on April 25, 1908, appellants denied all liability; subsequently bids were called for and submitted based on specifications contained in the surveyors' report (Exhibit "C") for the repair of the vessel, the lowest of which was for $14,027; but the vessel, instead of being repaired was sold for $750; and appellants having denied all liability, this litigation was commenced by the filing of libels *in personam.*

THE PLEADINGS.

The third amended libels allege the issuance of the policies of insurance by appellants for the term from July, 1907, to July, 1908; the sinking of the vessel on December 15, 1908 (? 1907), while properly and securely moored; the consequent damage; salvage operations and floating of vessel January 11, 1908; hauling out on February 12, 1908; and diligent effort to ascertain extent of damage and estimated cost of repairs completed on April 15, 1908; proofs of loss; denial by appellants of all liability; sale at $750; depreciation by reason of damage by sinking; salvage expenses incurred in laboring to save vessel; appellants' proportion of damage and salvage expenses.

The answers admit the issuance of the policies of insurance, the sinking of the vessel, floating her, hauling her out, denial by appellants of all liability; deny diligent effort on part of appellee to ascertain extent of damage and estimated cost of repairs; deny any liability for damage sustained by sinking or salvage charges in laboring to save vessel.

And the answers allege affirmatively:

That, by the policies in question, appellee expressly warranted to appellants that during the term of the policies the vessel would be and remain employed in the general freighting and passenger business on Puget Sound within a radius of thirty miles from Seattle; that on December 3, 1907, in violation of said express warranties, the vessel was removed by appellee from Puget Sound and towed to a point in the Duwamish River, there moored to piling, laid up for the winter, out of commission, her master and crew discharged, her care and safety entrusted to a river boatman living on the river bank, and that on December 15, 1907, the vessel, while so moored, laid up, out of commission, her master and crew discharged, and her care and safety entrusted as aforesaid, filled with water and sank; that appellants have no knowledge or information as to extent of damages sustained by vessel by reason of her so sinking; and demanded proof of same, if material.

By stipulation, Article V of the 3d Amended Libels were considered as amended so as to allege: That the vessel was securely moored within the tidal waters within and near the mouth of the Duwamish River without notice to appellant of laying up, and without demand for or receipt of return premium; and while so laid up, by well-known custom, vessel was deemed to be and was in fact covered by the policies in question; and that while so properly moored on December 15, 1909 (? 1907), said vessel sunk and by reason thereof became damaged, and appellee suffered a loss and incurred expenses for labor to save the vessel.

On the issues as joined by the pleadings, testimony was taken before the Commissioner, to whom the case had been referred, and by deposition *de bene esse;* and, upon the pleadings and testimony taken, the cause was submitted to the court below and determined by it in favor of appellee; whereupon final decree was entered in the sum of nineteen-twentieths of the amount of the policies (plus interest and salvage) on the basis that appellee's loss was the difference between $15,000, the valuation, and $750, the proceeds of sale, i. e., nineteen-twentieths of the valuation; from which decree this appeal is taken.

SPECIFICATION OF ERRORS.

Asserted and Intended to be Relied Upon.

The above-named respondents, Yang-Tsze Insurance Association and Canton Insurance Office, Limited, assign for error in the findings, conclusions and decree of the District Court in the above-entitled causes Nos. 3848 and 3849, consolidated with cause No. 3858 under No. 3849, that the learned Judge thereof erred:

First: * * *

Second: In finding that from the time the vessel was sunk, reasonable diligence was exercised by the owner to float the vessel and to ascertain the extent of the damage;

Third: In finding that reasonable care was exercised in arranging for the raising of the vessel;

Fourth: In finding that there was nothing which showed the libellant was negligent (in raising the vessel);

Fifth: In finding that the form of policy in issue referred to as the "San Francisco Hull Time Policy" covers a vessel when laid up;

Sixth: In finding that the place where the boat was moored or laid up was at the mouth of the Duwamish River;

Seventh: In finding that the place where the boat was moored or laid up was within the limits prescribed by the policy;

Eighth: In finding that this (place where the vessel was moored or laid up) was a customary and usual place where vessels were laid up;

Ninth: In finding that this (place where the vessel was moored or laid up) was considered safe in shipping circles;

Tenth: In finding that this (place where the vessel was moored or laid up) was on Elliott Bay;

Eleventh: In concluding that the contention that no liability could attach because of a breach of warranty in the policy, in that the vessel was laid up and not employed in the general passenger and freighting business on Puget Sound was not well founded;

Twelfth: In concluding that the libellant was entitled to recover the amount of the policies or any part thereof;

Thirteenth: In directing that a decree be entered in favor of libellant in the amount of the policies;

Fourteenth: In entering the final decree of December 15, 1913, in favor of libellant and

(a) against respondent Yang-Tsze Insurance Association in the sum of forty-nine hundred and fifty-two and 80/100 ($4,952.80) dollars and in addition thereto three-ninths of the costs therein taxed at $186.36;

(b) against respondent Canton Insurance Office, Limited, in the sum of sixty-six hundred and three and 73/100 ($6,603.73) dollars and in addition thereto four-ninths of the costs therein taxed at $186.36;

(c) and ordering, adjudging and decreeing that unless said decree be satisfied or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this court, libellant have execution against said respondents Yang-Tsze Insurance Association and Canton Insurance Office, Limited, for the sums and costs aforesaid;

Fifteenth: * * *

Sixteenth: In not entering a decree in favor of said respondents Yang-Tsze Insurance Association and Canton Insurance Office, Limited, and against

libellant, dismissing libellant's 3d Amended Libels against them and for costs against libellant.

ARGUMENT.

There are five points that appellants raise on this appeal.

First: That, if laying up for winter were permissible under the policies, the contract of insurance, so far as it covered the vessel during laying-up period, was not maritime in its character and admiralty has no jurisdiction.

Second: That the express warranty was a continuing warranty during the term of the policies.

Third: That the loss and damage complained of occurred during breach of the warranty while the vessel was in waters other than those prescribed by that warranty.

Fourth: Abandonment Waived. The appellee failed to exercise diligence to float the vessel and to ascertain the extent of the damage, thereby waiving its right to abandon.

Fifth: Partial Loss. That the proofs fail to disclose the amount of the loss and damage, sustained by appellee by reason of the sinking of the vessel, recoverable under the policies.

FIRST.

If laying up for winter were permissible under policies, the contract of insurance, so far as it covered the vessel during laying up period, was not maritime in character and admiralty has no jurisdiction.

The affidavit of Warner attached to and a part of the proofs of loss introduced by appellee and received in evidence (Exhibit "E") is to the effect that "he was appointed by the proper parties to move the Steamer VASHON from King Street wharf, Seattle, up the Duwamish River where she was to be *laid up for the winter* * * *; that the deponent then entered into an agreement with Mr. Faber to take care of and guard the VASHON. Faber is the owner of the boathouse located about one hundred yards to the stern of the steamer and has two men in his employ, one of which is constantly on duty".

Hamilton, the vice-president of appellee (Record p. 30), witness for appellee, testified that the vessel was moored in the Duwamish River by Captain Warner acting as captain for appellee (Record p. 79).

The third amended libels as amended by stipulation, allege the laying-up of the vessel (Record p. 26).

When the vessel was so moored, she was laid up for the winter, out of commission, her master and crew discharged, and her care and safety entrusted to that river boatman. She then ceased to be an agency of commerce, was withdrawn from navigation and without maritime obligation. The policies in suit, so far as they covered the vessel during this laying-up period, were consequently not of a maritime character.

It was said by this court in *Pacific Coast Steamship Company vs. Ferguson,* 76 Fed. 993, that while the test in American courts of the admiralty jurisdiction is whether or not the contract has reference to maritime services or maritime transaction, its scope has not been extended but remains as defined in *Insurance vs. Durham,* 11 Wall. 1, where the court said that the jurisdiction depended, not on the place where the contract was made, but on the subject-matter of the contract; if that was maritime, the contract was maritime; and that might be regarded as the established doctrine of that court.

"The test is, the actual *status* of the structure, as being fairly engaged in commerce or navigation. A contract, claim or service to be cognizable in the admiralty, must be maritime in such a sense that it concerns rights or duties appertaining to commerce or navigation. 1 *Conk. Adm.* 8, *The Belfast,* 7 Wall. 624."

The Hendrick Hudson, Fed. Cas. No. 6355.

"The true criterion by which to determine whether any water craft or vessel is subject to admiralty jurisdiction, is the business or employment for which it is intended or is susceptible of being used, or in which it is actually engaged rather than its size."

The General Cass, Fed. Cas. No. 5307.

"In actions on contract the agreement sued upon must be maritime in its character. It must pertain in some way to the navigation of the vessel, having carrying capacity and employed as an instrument of travel, trade or commerce, although its form, size and means of propulsions are immaterial."

Raft of Cypress Logs, Fed Cas. No. 11527;

Pile Driver E. O. A., 69 Fed. 1005.

In the case of *The Sirius,* 65 Fed. 226, opinion by Morrow, Judge, the services of a watchman rendered while the vessel lay at her home port, out of commission, with no voyage in contemplation, were held to be non-maritime in character. To the same effect, *The James T. Furber,* 157 Fed. 124.

In the case of *The C. Vanderbilt,* 86 Fed. 785, wharfage furnished a vessel while withdrawn from navigation was held to be non-maritime in character and a lien therefor denied; to the same effect *The Murphy Tugs,* 28 Fed. 429.

In the case of *The Richard Winslow,* 71 Fed. 426, C. C. A. 7th Circuit, where there was a contract to transport grain from Chicago to Buffalo, the grain to remain in the vessel in storage for the winter upon its arrival at Buffalo, the contract for storage was held not maritime.

In the case of *The Winnebago,* 141 Fed. 945, C. C. A. 6th Circuit, it was held that a vessel ceases to possess a maritime character when she is permanently withdrawn from her use as an agency of commerce.

In the case of *The City of Detroit vs. Grummond,* 121 Fed. 963, C. C. A., 6th Circuit, a contract for insurance against fire on a vessel lying moored and in use as a hospital was held non-maritime in character for the reason that it did not relate to navigation but only to a vessel which was to lie moored in the Detroit River as a hospital.

In the case of *The Hydraulic Steam Dredge No. 1,* 80 Fed. 545, C. C. A. 7th Circuit, it was held

that even upon the assumption that the structure under consideration (a dredge) was a ship or vessel and within the admiralty jurisdiction, that jurisdiction will not be asserted to enforce a contract touching the ship unless such contract is maritime in its nature; that not every contract having reference to a ship is within the admiralty jurisdiction, but only such contracts as pertain to the navigation of a ship or assists the vessel in the discharge of a maritime obligation. It is not enough that the service is to be done on the sea or with respect to the ship, it must relate to trade and commerce upon the navigable waters.

In the case of *The George W. Elder,* 206 Fed. 268, where a vessel while engaged in commerce was wrecked and sunk, abandoned to the underwriters and raised after operations lasting one year and a half, during which time her enrollment was surrendered, and after raising was towed to a dry dock, repaired and thereupon resumed her business in coast-wise trade, it was contended, in resisting a lien for repair in the dry dock that the ship at the time of being repaired was not engaged in commerce and navigation, but this court held:

> "True, while lying in the dry dock, she was idle, but she was being made ready to resume her voyages. Her position was wholly *differ-*

ent from that of a vessel purposely *withdrawn from navigation or laid up* because her field of operation is for some reason closed."

In the case of *The Jefferson,* 158 Fed. 358, admiralty jurisdiction was denied in a suit to recover for salvage services rendered in aiding to extinguish a fire on the vessel while in dry dock; and, while this was reversed in the Supreme Court, *Simmons vs. S. S. Jefferson,* 215 U. S. 130, the latter court found:

> "That the steamship before being docked had been engaged in navigation, was dedicated to the purpose of transportation and commerce and had been placed in the dry dock to undergo repairs to fit her to *continue in such navigation* and commerce";

and held:

> "In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, *for the purpose of making necessary repairs to fit her for continuance in navigation,* she is placed in a dry dock."

The ground of the decision is the purpose to continue the vessel in commerce and navigation in which she was engaged before being drydocked.

In the case at bar the vessel had been in commerce and navigation but, at the time of the loss

complained of, had been and was purposely withdrawn from navigation and commerce, laid up because her field of operation was for some reason closed, a wholly different position, as this court said in *The George W. Elder, supra.*

It is not enough to say that the policies of insurance cover the vessel against marine risks during the laying-up period, and that therefore they are maritime in character. The VASHON having been withdrawn from navigation and use as an agency of commerce, it ceased to be a subject of maritime contract.

The watchman on a vessel laid up and withdrawn from navigation has a direct relation to that property and to its perils—stands between that property and those perils to minimize the loss arising from the latter either to the owner (if the property is uninsured) or to the underwriters (if the property is insured) against those perils.

Where there is no insurance, the watchman stands between the owner and the perils; where there is insurance, the underwriter stands between the owner and the perils, while the watchman stands between the underwriter and the perils; in either case the watchman and the perils are juxtaposed.

If such a vessel is not a subject of maritime contract for services of a watchman to safeguard that property against perils incident to laying-up, *a fortiori,* such a vessel is not a subject of maritime contract for the insurance of the vessel against those perils.

Nor could it be successfully contended that, as the policies when they attached were maritime in character, therefore they continued as such when the vessel was withdrawn from navigation.

In *Pacific Coast Steamship Co. vs. Ferguson, supra,* where the contract was held partly maritime and partly non-maritime, this court decided that the admiralty court had no jurisdiction of a suit to enforce the non-maritime part of such contract. To like effect, *Grant vs. Poillon,* 20 How. 162.

Assuming laying-up were permissible under the policies and the vessel were covered while laid-up in the Duwamish River, appellee's remedy for the loss under the policies was at law and not in admiralty.

Failure to assign as error the question of jurisdiction, does not preclude appellants from raising it at this stage of the proceedings.

Simpkins Federal Suit at Law, 186.

This court, on its own motion, will reverse a decree of the lower court for want of jurisdiction as to the subject-matter.

Puget Sound Navigation Co. vs. Lavendar et al, 156 Fed. 361.

For these reasons we submit that the learned court below erred in its memo-decision in concluding that libellant was entitled to recover and directing and entering a decree for libellant, and not entering decree dismissing the 3d Amended Libels, (12th, 13th, 14th and 16th Assignments of Error).

SECOND.

That the express warranty was a continuing warranty during the term of the policies.

I.

The express warranty of the policies reads:

> "Warranted employed in the general freighting and passenger business on Puget Sound, within a radius of thirty miles from Seattle."

The construction to be given the word "employed" was, during the progress of the cause in the court below, argued at length by the respective parties before Judge Hanford, the appellants contending that the warranty was a continuing one

during the term of the policies; and that learned judge in a memo-decision filed in the cause (Record pp. 24-26) held:

> "The word 'employed' is a verb of the past or present tense and cannot be accurately used potentially to indicate future action unless qualified by additional words not found in these warranty clauses. The argument of respondents assumes that the warranties relate to future employment of the vessel during the life of the policies and that the clauses should be interpreted to read—vessel warranted to be employed in the general passenger and freighting business on Puget Sound. The interpolation of the words 'to be' would materially change the meaning of the clause, and it is not permissible to thus interpolate in order to change the meaning of a contract which courts are required to enforce strictly according to the terms assented to by the parties."

On the final hearing below, the matter was further argued, the appellants contending as before, before Judge Neterer, who in a memo-decision filed in the cause (Record p. 201, at p. 206), said:

> "The contention that no liability could attach because of a breach of warranty in the policy, in that the vessel was laid-up and not employed in the general passenger and freighting business on Puget Sound was presented to Judge Hanford, and the reason then given express my views as to the use of the word 'employed' when used in connection with the evidence in the case."

The word "employ" is a verb transitive, meaning:

(2) "To use, to have in service, to cause to be engaged in doing something; (c) to have or *keep at work.*

Webster's International Dictionary, 1902.

(2) "To give occupation to; make use of the time, attention or labor of; *keep busy or at work.* (4) Syn. 2. Employ, Hire * * * employ expresses continuous occupation more often than hire does.

Century Dictionary.

(1) "* * * set or *keep at work.*

Standard Dict. Funk & W., 1895.

All the authorities define "to employ" as: "to keep at work".

Keep is a verb transitive meaning:

(1) "to remain in any position or state; to continue."

The sense is essentially a continuing one, continuity is one of its elements.

So to say in an insurance policy: "vessel warranted in a certain business" means warranted in that business at the time the policy attaches; but to say "vessel warranted employed in a certain business" is equivalent to saying "vessel warranted kept at work in a certain business".

"Employed" or kept at work implies, not a momentary or a completed state but a continuing state or condition.

> "The word 'employed' is more commonly used as signifying *continuous* occupation."
>
> *Wilson vs. Gray,* 127 Mass. 98, 99.

> "To be employed in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it."
>
> *U. S. vs. Catherine,* 25 Fed. Cas. 332, 338;
>
> *U. S. vs. Morris,* 39 U. S. 464 at 475.

Further, the verb "employ" is a verb transitive requiring an object to complete its sense and donating action terminating on some object; and may be used in the active or passive voice. If used in the active voice, the imperfect or past participle "employed" must be followed by the object upon which the subject acts. The vessel does not employ anything—it is the owner that employs the vessel.

But the word "employed" in the warranty under consideration is not used in the active voice, the vessel is not employing anything, past, present or future. It is the owner who is employing the vessel. The vessel is *being* employed in certain trade and waters—that is the passive voice of the

verb "employ" and represents the subject as receiving an action.

The passive voice is formed by writing with the past participle of any transitive verb some form of the auxiliary verb "to be" and in no other way.

So we say: vessel warranted (1) being employed, (2) to be employed, (3) was employed, (4) is employed, (5) shall or will be employed. We can use the past participle "employed" in the passive voice only by supplying some form of the auxiliary verb "to be"—the infinitive "to be", the gerund "being", the present "is" or the present perfect "has been", the imperfect "was" or the past perfect "had been", the future "will be" or future perfect "will have been". And whenever we use the transitive verb "employ" in the passive voice without some form of the verb "to be" then some form of that auxiliary is *understood or implied.*

> "Satan exalted sat, by merit *raised* to that bad eminence."
>
> *Paradise Lost,* Book II, line 1.

> "The wretch * * * shall go down
> * * *
> *Unwept, unhonour'd* and *unsung.*"
>
> *Lay of Last Minstrel,* Canto VI, Stanza 1.

So much of the memo-decision of the court (Record pp. 24-26) as says:

> "The interpolation of the words 'to be' would materially change the meaning of the clause",

does violence to the rules of grammar governing our language since the days of Chaucer.

What form of the verb "to be" shall be supplied or implied in relation to the word "employed" as used in the warranty?—shall the contract read:

vessel warranted (is) employed

vessel warranted (was) employed

vessel warranted (will or shall be) employed, or

vessel warranted (to be) employed.

The appellants' contention was and is that employment referred to in the warranty relates to the future which would require the interpolation of the words "will be" or "shall be" or "to be" in a continuing sense, so that the warranty would read:

> "Warranted (will be or shall be or to be) employed," etc.

II.

The court below, Judge Hanford presiding, on the re-hearing of the matter after the filing of his memo-decision, stated orally from the bench that it would permit proof to be offered and received as to

whether the warranty in the policies related to the past, present or future.

This proof is contained in the record—the witnesses for appellants, Hutchison, agent for appellant Yang-Tsze (Record pp. 139-140); Frederick, agent for appellee, China Traders (Record pp. 141-142); Mason, agent of appellant Canton (Record pp. 124-126); Rosenthal, president San Francisco Board of Marine Underwriters (Record pp. 149-150); Pinkham, manager of Marine department of J. B. F. Davis & Son of San Francisco, agents Standard Marine Ins. Co. of Liverpool (Record pp. 152-153); Smith, twenty-eight years' experience general marine agent at San Francisco (Record pp. 155-156); Thompson, marine insurance brokerage business for nine years at San Francisco (Record p. 162); Barneson, shipping and commission business for twenty years (Record pp. 168-169); Alexander, forty years in marine insurance business (Record pp. 175-176); Theobald, manager for agents of appellant Canton, twenty-three years' experience in marine insurance business (Record p. 183), all testify that the express warranty under discussion, and as contained in the policies in suit, applies to the entire term of the policies; that is, the warranty is that the vessel *will be employed,* as indicated, *during the life* of the policies.

Witnesses for appellee: Taylor (Record p. 93), La Boyteaux (Record pp. 193-195), and Levison (Record pp. 195-198), were asked certain questions respecting the policies in suit, but those questions as propounded by appellee expressly in terms excluded consideration of the "endorsements" i. e., the warranties, so that there is no testimony on behalf of appellee upon the question under present consideration, as to whether the warranty expressed in the policy was a continuing one or otherwise.

Considering the number and character of appellants' witnesses and their unanimity, and appellee's silence on the question, we submit that appellants' contention that the warranty under discussion applied during the life of the policies is established.

For these reasons, we submit that the learned court below erred in concluding that the contention that no liability could attach because of breach of warranty in policy in that the vessel was laid up and not employed in general passenger and freighting business in Puget Sound was not well founded.

(11th Assignment of Error.)

THIRD.

That the loss and damage complained of occurred during a breach of the warranty, while the

vessel was in waters other than those prescribed by that warranty.

I.

The proofs of loss submitted by appellee and the record discloses, and it is not denied or contended otherwise: That for some time immediately preceding, and at the time of the loss and misfortune to the VASHON complained of in the third amended libels, the insured vessel—

(a) had been and was withdrawn from the general freighting and passenger business;

(b) had been and was withdrawn from all business or trade, general or special;

(c) had been and was out of commission, for the purpose of laying-up for the winter;

(d) had been towed from and out of Elliott Bay or Seattle Harbor, an arm of Puget Sound, and from and out of Puget Sound, into and up the Duwamish River;

(e) had been and was moored in the Duwamish River for the purpose of laying-up for the winter;

(f) had been and was laid-up in the Duwamish River for the winter,

and the appellants contend that the express warranty on the part of appellee contained in the policies was thereby breached.

There is no dispute between the appellants and appellee as to the exact locality in the Duwamish River that the vessel was moored.

The proofs of loss submitted in evidence by appellee (Exhibit "E"), contain a diagram of the place of the sinking of the vessel designated as Duwamish River; the affidavits of Warner and Faber forming a part of said proofs of loss, recite the mooring and the sinking of the vessel in the Duwamish River; on the appellee's Exhibit "J", a blueprint of township 24 north, range 4 east, W. M., the location of the vessel in the Duwamish River is, by appellee's witness Warner who moored her, indicated by the letter "M" "right below the figures '30' " (Warner's test., Record pp. 95-96). The third amended libels as amended alleged the vessel moored within the mouth of the Duwamish (Record p. 26).

Appellants' Exhibits 26 and 27, copies of the field notes of part of said township and of the plat of said township, certified by the U. S. Surveyor General for the State of Washington, were introduced and received in evidence "for the purpose of

showing the meanders of the Duwamish River at and about the place where the wreck occurred". (Record p. 144.)

Appellee's witness Warner was asked, on direct examination, and answered as follows:

> Q. Now, have you at any time observed and to what extent, if any, these lands about the place where the vessel was moored, were flooded, if at all, at high tides?
>
> A. The only time I ever noticed them flooded was when there had been a big freshet.
>
> Q. Were the lands on either side of the river diked there?
>
> A. No; they were not diked. When there was a big tide there it was just up to the bank.
>
> Q. At extreme high tide was this land flooded there around where this vessel was moored?
>
> A. No.
>
> Q. To no extent?
>
> A. Not that I saw when I was there.
>
> Q. Were you ever up there at extreme tide so that you could observe the extent, if any, to which this land might be flooded with water?
>
> A. Oh, I have seen it flooded at the time of the freshets; that is all; it is flooded all over then.
>
> Q. Have you been up in that vicinity at other times?
>
> A. Yes, sir.

> Q. Well, what is the character of this land at the point and below the point, about the point where this vessel was moored, as being tide land or not?
>
> A. I would not consider that was tide land. When it came over at the bank—well I never seen it come over the bank there. (Record pp. 100, 101.)

Captain Barneson, witness for appellants, on cross-examination, testified that he knew where the tide flats of Seattle were (Record p. 172); and, on re-direct examination, that he did not consider Duwamish River, Puget Sound (Record p. 173); and, on re-cross examination, that you are not in the (Duwamish) River when you are on the (Seattle) tideflats; that he would not consider you were in the river when you are on the flats (Record p. 174).

II.

Some testimony was introduced by appellee to the effect that it is the custom on the Pacific Coast of the United States to consider vessels to be held covered by their insurance while *laid-up*. We do not dispute that, in a proper case, the insurance remains in force while the vessel is laid-up. "Laying-up" is withdrawing a vessel from commission, when, with consent of insurers or in accordance with custom in a proper case, the vessel is put on "Har-

bor risk" at a reduced rate of premium. But "laying-up" does not in itself operate to relieve the restrictions of the policy as to prescribed waters. And where custom is inconsistent with the contract, the contract must control; a custom inconsistent with the terms of the contract cannot be incorporated into it.

U. S. vs. Buchanan, 8 How. 83;
Moran vs. Prather, 23 Wall. 492;
1 *Parsons, Marine Ins.*, 88.

III.

The Civil Code of California, which is in express terms written into the policies, provides:

> "Sec. 2608. *Warranty as to the future.* A statement in a policy which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.
>
> "Sec. 2610. *What acts avoid the policy.* The violation of a material warranty or other material provisions of a policy on the part of either party thereto, entitles the other to rescind."

An examination of the fourth clause of the policies in suit will disclose that, under the San Francisco Hull Time form of policy, the use of certain ports and certain latitudes in the eastern and

western hemispheres and whaling, fishing, sealing or trading are prohibited, though the vessel may touch and stay at any ports or places, if thereunto obliged by stress of weather, etc.

Without endorsement prohibiting, the vessel could proceed anywhere in the navigable waters of the globe except the particular prohibited ports, places and waters, and even these under stress of weather.

The endorsement on the policies in suit, restricting the waters permitted from the navigable waters of the globe to "Puget Sound within a radius of thirty miles from Seattle," was, in the language of Sec. 2608, C. C. C., *supra,* a statement which imported that it was intended not to do a thing which materially affected the risk, that is, not to use the waters permitted in the printed body of the policies except Puget Sound, and such statement was a warranty that such use should be so restricted.

The risks appellants were insuring against were exclusively the risks incident to navigation on Puget Sound, not those incident to navigation on any other waters or incident to any other use of the vessel than its navigation.

Parsons defines an express warranty as—

"stipulations or promises of the assured, in the policy that certain things exist or shall exist, or have been or shall be done."

1 *Parsons on Marine Insurance,* 337.

"The warranty is equally binding and a breach of it equally fatal whether the thing warranted be material or immaterial."

Id. 337.

Phillips defines an express warranty as—

"an agreement expressed in the policy whereby the assured stipulates that certain facts are, or shall be, true or certain acts shall be done, in relation to the risk."

1 *Phillips Ins.* (3rd Ed.) Sec. 754.

The distinction of an express warranty from a representation is that—

"an express warranty must be 'strictly' and it is even said 'literally' complied with; whereas it is sufficient that a representation is complied with substantially."

Id. Sec. 762.

"It is held, that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into; the assured has chosen to rest his claim against the insurers on a condition inserted in the contract, and whether the fact or engagement, which is the subject of the warranty, be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction

put upon warranties, in this particular, has perhaps arisen, in part, from the maxim of the common law, that conditions are to be severally construed in regard to the party imposing them on himself."

" 'A warranty,' says Lord Mansfield, 'must be strictly performed, nothing tantamount will do.'

"Mr. Justice Buller: 'It is a matter of indifference whether the thing warranted be material or not, but it must be literally complied with.'

"Mr. Justice Ashhurst: 'The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally.'

"And Lord Eldon: 'When a thing is warranted it must be exactly what it is stated to be.' "

Id. Sec. 762.

Arnould defines an express warranty as—

"a stipulation inserted in writing on the face of the policy on the literal truth or fulfilment of which the validity of the entire contract depends.

"These written stipulations either allege the existence of some fact or state of things, at the time or previous to the time of making the policy, as that the thing insured is neutral property; that the ship is of such a force; that she sailed on such a day or was all well at such a time; or they undertake for the happening of future events or the performing of future acts as, that the ship shall sail on or before a given

day; that she shall depart with convoy; that she shall be manned with such a complement of men, etc.

"In the former case, Mr. Marshal terms the stipulation an affirmative, and in the latter a promissory warranty."

2 *Arnould Mar. Ins.,* 7th Ed., Sec. 628.

An express warranty—

"requires a strict and literal fulfilment, i. e., what it avers must be *literally true,* what it promises must be exactly performed."

Id. Sec. 632.

"No cause, however sufficient; no motive. however good; no necessity, however irresistible, will excuse non-compliance with an express warranty."

Id. Sec. 635.

A representation—

"differs from an express warranty as that always makes a part of the policy and must be strictly and literally performed."

Hazzard Administrators vs. N. E. Ins. Co., 8 Peters 557 at p. 580.

In the case of *Hastorf vs. Greenwich Insurance Co.,* 132 Fed. 122, the policy provided—

"warranted by the assured to be employed exclusively in the freighting business and to navigate only the waters of the Bay and Harbor of New York, the North and East Rivers and inland waters of New Jersey."

The loss was suffered while the vessel was lying at a wharf on the south side of Rondout Creek, about two and one-half miles from the Hudson River; the court said:

> "There can be no doubt that Rondout Creek is a different body from the North or Hudson River, and that the language used does not in terms cover the locality in which this accident happened, but, to a certain extent, the creek is a continuation or tributary of the river, and testimony was permitted for the purpose of ascertaining whether the former was intended to be covered."

Further testimony as to whether the waters of the creek were considered waters of the North River was offered and tentatively received and considered by the court, which said:

> "I conclude that it *affords no aid to a construction* of the policy which is *apparently plain and unambiguous* in its terms. I do not see how its language can be extended to cover this creek."

In *Pearson vs. Commercial Union Assurance Co.,* 1 App. Cas. 498, 2 Aspinall's Mar. Cas. 100, cited in *Hastorf vs. Greenwich Ins. Co., supra,* plaintiff's vessel was insured against fire by the defendants under a policy of insurance expressed to be

> "on the hull of the steamship Indian Empire, with her tackle, furniture, and stores on board belonging, lying in the Victoria Docks, London,

with liberty to go into dry dock and light the boiler fires once or twice during the currency of this policy."

There was no dry dock attached to the Victoria Docks, but there was a pontoon dock, called the Thames Graving Dock, attached to the Victoria Docks, in which repairs ordinarily executed in a dry dock could be done, but the vessel was too large to go into it. Preventive measures against fire, and appliances for extinguishing it, existed in the Victoria Docks and the Thames Graving Docks. The vessel was towed from the Victoria Docks to the nearest convenient dry dock, her paddle wheel having been taken off in the Victoria Docks in order to enable her to go into the dry dock. After completing her repairs in the dry dock and coming out of it, she was taken up the river Thames to a buoy some few hundred yards above the dry dock, and there moored for ten days in order that her paddle wheel might be replaced. This was according to the ordinary course pursued by ship builders; but the vessel might have been towed at once to the Victoria Docks, and have had her paddle wheel replaced there, though at a far greater expense. The vessel was burned at her moorings, during the currency of the policy, and the defendants disputed their liability; held, on appeal affirming court below, that

the ship was covered by the policy while in the dry dock and while going to and returning therefrom, but not during the time she was moored in the river for a purpose unconnected with the transit.

In *Birrell vs. Dryer,* 9 App. Cas. 345, 5 Aspinall's Mar. Cas. 267, cited in *Hastorf vs. Greenwich Ins. Co., supra,* where the shipowner claimed against underwriters of a time policy of insurance as for a total loss, and the underwriters resisted the claim on the ground of a breach of a warranty in the policy. The warranty was "No. St. Lawrence" between certain dates, and it was admitted that the vessel had navigated the Gulf of St. Lawrence within the prohibited time, but the owners contended that the warranty applied only to the river St. Lawrence. It was proved that the navigation of the Gulf was dangerous that season but less so than that of the river. Held, by the House of Lords, that in the absence of any evidence to that effect the words of the warranty disclosed, no ambiguity or uncertainty sufficient to prevent the application of the ordinary rule of construction as to negative words, and that both the Gulf and the river were prohibited; Lord Blackburn said:

> "Reliance was placed by some of the judges below on the maxim *'fortius contra proferentem'*. I do not think the description of the dis-

trict excluded can be considered as the words of one party more than the other. The ship-owner, knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the ship a description of that district in order to induce the underwriters to agree to a lower premium.

"I am by no means prepared to say that in some cases where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of assured and underwriters that the description should be definite; and that is attended to in the warranty 'no British America between the 1st of October and the 1st of April'. No one could imagine that there was a material difference in the risk between a voyage from the most northern part in the United States, and one from the most southern part of British North America, or between a voyage commenced on the last day which is not prohibited, and one commenced on the first day which is prohibited. But a fixed limit is agreed on to prevent disputes."

IV.

Applying these principles to the case at bar, the court must find: That it was the intention of the parties, under the express warranty, to have the policy limit the extent of the risk assumed to a loss occurring while the vessel was

(a) "employed in the general freighting and passenger business";

and while the vessel in such employment was

(b) "on Puget Sound, within a radius of thirty miles from Seattle".

It would do violence to its language to hold that the policy covered a risk while the vessel was not so employed and while, in fact, it was out of commission and laid up for the winter and not in any employment whatever.

Certainly being "employed" is diametrically opposite in its meaning to being "unemployed".

The insurer was at liberty to select the character of the risk he was to assume, and having exercised that right by limiting that risk to a loss occurring while the vessel was "employed", the assured cannot now complain, when by an act of its own the vessel became "unemployed" and a loss occurred, because the insurer denies liability.

And it would do equal violence to its language to hold that the policy covered a risk while the vessel was *not* on Puget Sound at all but laid up for the winter in the Duwamish River. Duwamish River, as well as Puget Sound, are well-known geographical divisions, each capable of being definitely plotted on chart or map with reference to degree,

minute and second of latitude and longitude, and each occupying a separate and distinct portion of the earth's surface.

Puget Sound is an arm of the Pacific Ocean, generally speaking, without channel or current, with defined shores, level but rising or falling as a body with tides, salt in its character, and therefore of greater specific gravity than "water" that is fresh water. On the other hand, the Duwamish River is a body of fresh water having its source in the mountains and discharging its waters through its "mouth" into the sea, having a well-defined channel between well-defined banks, and, by reason of its source being at a higher altitude than its mouth, having an appreciable current always setting one way—flowing to and into the sea. Its freshness and its flow above its mouth are affected by the flood tides of Puget Sound (so are the waters of the Columbia for one hundred miles up from its mouth affected by the ocean tides); but that does not transform any part of the Duwamish River between its source and its mouth so affected, into Puget Sound—if it did, we would have *Puget Sound* within the mouth of the river and up the river towards its source, so far as the river is thus affected by flood tide, and *Duwamish River* at low water when that area is unaffected by the tides.

The words of the express warranty would be purposeless if the policy should be held to assume a risk of loss occurring whether the vessel was employed or unemployed, whether the vessel was on Puget Sound or in the Duwamish River, or in Lake Washington, or in Lake Union, or in the Black River, or in the White River, all within a radius of thirty miles from Seattle.

The learned judge below, in his memo-decision on the merits to support the position that the place where the vessel was laid up, "at the mouth of the Duwamish River", was within the limits prescribed by the policies in suit, cites *Insurance Co. vs. Clark,* 157 S. W. 291, where the policy provided, in a typewritten clause, that it should be in force only while the vessel was used in the gulf waters of the United States between Key West and the mouth of the Rio Grande River, and the printed form of the policy declared it was the intention of insurer to indemnify insured for loss to vessel against perils of the harbors, bays, sounds, seas, rivers and other waters as above named. The vessel was lost in a river in which the tide ebbed and flowed; Held, that it was lost in Gulf waters within the purview of the policy; the expression "Gulf waters" like the word "sea" including not only the high seas, but the bays, inlets

and rivers as high up as the tide ebbs and flows; and citing *Waring vs. Clark,* 46 U. S. 441, to the effect that the "sea" as defined by the admiralty courts means, not only the "high seas" but the arms of the sea, waters flowing from it into ports and havens, and as high up rivers as the tide ebbs and flows, and holding further that—

> "if such be the sea, certainly gulf waters may be construed to mean the waters as high up rivers, as the tide ebbs and flows; again, that waters within the ebb and flow of the tides are considered the sea, is decided in the matter of *In re Gwin's Will,* 1 Tuck. (N. Y.) 44. See also, *Cole vs. White,* 26 Wend. (N. Y.) 516".

In *Ins. Co. vs. Clarke, supra,* the policy covered "the gulf *waters*" and "the harbors, bays, sounds, seas, rivers, and other waters as above named", and in its opinion the court (the Court of Civil Appeals of Texas) cites *Crary vs. Port Arthur, etc., Dock Co.*, 92 Tex. 275, 47 S. W. 967, wherein the Supreme Court of Texas, in construing the phrase "waters of the Gulf of Mexico" as used in Art. 721 of the Rev. Statutes of that state relating to constructing, owning and operating deep water channels from the waters of the Gulf of Mexico along and across any of the bays on the coast, etc., say:

> "We think the language in question is far more comprehensive than it would have been had the statute read 'from the Gulf of Mexico.' "

In the case at bar, the language of the policies is not "waters of Puget Sound — harbors, bays, sounds, seas, rivers, and other waters as above named", but "Puget Sound within a radius of thirty miles from Seattle".

We submit that the fact that the vessel was, at the time of the loss, neither employed in the general freighting and passenger business or any other business or trade, nor on Puget Sound within a radius of thirty miles from Seattle, violated the express warranties of the assured, and the appellants are not liable for the loss under the policies.

For these reasons we submit the learned Court below erred in its memo-decision, in finding:

1. That the form of policy in issue covers a vessel when laid up;

2. That the place where the boat was moored or laid up was at the mouth of the Duwamish River;

3. That the place where the boat was removed or laid up was within the limits prescribed by the policy;

4. That this place was a customary and usual place where vessels were laid up;

5. That this place was considered safe in shipping circles;

6. That this was on Elliott Bay;

And in concluding that there was no breach of the warranty.

(5th, 6th, 7th, 8th, 9th, 10th and 11th Assignments of Error.)

FOURTH.

Abandonment Waived.

The appellee failed to exercise diligence to float the vessel and to ascertain the extent of the damage, thereby waiving its right to abandon.

The Court below in its ruling on exceptions, held that the appellee had by delay waived its right to abandon, but subject to leave being granted to further amend the libels if appellee claimed any justifiable delay. The third amended libels do not allege any abandonment.

The vessel sunk on December 15, 1907; was floated January 11, 1908; hauled out and cleaned February 12, 1908; survey completed April 15, 1908; all of these things happened and were done and performed within the corporate limits of the City of Seattle, the place of business of appellee.

Captain Gibbs, one of the appellee's surveyors, and witness for appellee, testified, on direct examination, that there was delay in getting the vessel out of the water; that it took Captain Sloan, who had the contract from appellee for hauling the vessel out, "a long time to lay his ways and get ready to haul the vessel out. He carried away a great deal of his gear in trying to pull her out. He went to work the wrong way. After he notified us she was ready to survey, we went down and found her stern still in the water, so we couldn't" (Record, p. 38); that it appeared to witness that Sloan took a great deal longer time than was necessary to do it (hauling out and getting her out so survey could be made); that "it was evident to us he went to work the wrong way and used up a good deal of time and money" (Record, p. 39).

Gerald Lowe, in charge of Johnson & Higgins, insurance brokers for appellee, witness for appellee, testified, that the vessel "was hauled out and cleaned the same month she was floated, the end of January, 1908" (Record, p. 113); that it then took until April to ascertain the extent of the damage; and when asked "why did it take until April", answered:

> "The principal difficulty was that it was impossible to get the agent, surveyor of the

> underwriters to say what the damage was" (Record, p. 113); and further testified: "I kept pressing them (the owners) for Captain Gibbs' report as to what her damage was. They told me they could not get it, so they did secure the delay" (Record, p. 119), *i. e.,* owners instructed Johnson & Higgins, then brokers, to delay notice of abandonment (Record, p. 119).

This "surveyor of the underwriters" was Captain Gibbs, holding the position at Seattle of surveyor for the San Francisco Board of Marine Underwriters, who testified when called by appellee that he was acting at the request of owners of the vessel (Record, p. 45) and he had no instructions from the Underwriters at that time to act for them (Record, p. 45), and whom the Court below, in its memo-decision on the merits, found was not authorized to act for respondents (appellants) but was employed, with Mr. Frank Walker, by the owners of the vessel (Record, p. 201).

So we have a delay in hauling the vessel out by Sloan, who, as between appellants and appellee, was appellee's agent; and we have a delay in saying what the damage was by Gibbs, who, as between appellants and appellee, was appellant's agent; and the failure of appellee to have Mr. Walker, the other of appellee's surveyors, advise as to damage until

Captain Gibbs finally stated what the loss was (Record, p. 113).

For these reasons, we submit that the learned Court below erred in its memo-decision in finding:

1. That from the time the vessel was sunk reasonable diligence was exercised by the owner to float the vessel and to ascertain the extent of the damage.

2. That reasonable care was exercised in arranging for raising the vessel.

3. That there was nothing which showed that libellant was negligent (in raising the vessel).

(2d, 3d and 4th Assignments of Error.)

FIFTH.

Partial Loss.

That the proofs fail to disclose the amount of the loss and damage, sustained by appellee by reason of the sinking of the vessel, recoverable under the policies.

There was no actual total loss. It is an elementary principle in marine insurance that, without a valid abandonment on the part of the assured

(or the waiver thereof on the part of the insurer) there can be no recovery for a *constructive* total loss.

> *2 Arnould Insurance,* 7th Ed., Secs. 1043, 1091.
> *2 Parsons Mar. Insurance,* p. 185;
> Sec. 2705, *Civil Code of California.*

There having been no actual loss and no abandonment to sustain a claim for constructive total loss, the appellee's claim, if valid, is limited to a *partial loss.*

And, assuming that the appellee has sustained a partial loss within the conditions and express warranties of the policies, what would be the amount of its recovery herein?

The sound value of the steamer, let us assume, is the "agreed value" as contained in the policies, towit—$15,000.00.

The salved value, let us assume, was what she brought at sale subsequent to sinking and hauling out, towit—$750.00.

The depreciation would thus be $14,250.00.

But bids or proposals to repair the vessel in accordance with the specifications contained in the report of the marine surveyors, Gibbs and Walker (Appellee's Exhibit "C"), were received from re-

sponsible parties and offered in evidence; the lowest of such bids was in the sum of $14,027 plus old material.

Taking the measure of the partial loss in the sum of the lowest bid for repairs, $14,027.00, what would be the measure of the recovery against respondents for such *partial loss?*

The policies provide, clause 8, as follows:

> "It is agreed that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessel by perils insured against (except on anchors, copper and calking under the copper), as a commutation for the average difference between new and old; the remains of all articles replaced being considered as salvage and their proceeds deducted from the gross loss."

Other provisions follow where remetaling, including docking and calking, is necessary but it does not appear that the vessel was copper bottomed and such provisions therefore are not applicable to the case at bar.

The policies provide also that the provisions of the Civil Code of California shall govern and control the liability of respondents. That Code provides:

> "Sec. 2702. Every loss which is not a total loss is partial".

> "Sec. 2737. *Partial Loss.* A marine insurer is liable upon a partial loss, only for such proportion of the amount insured by him as the loss bears to the value of the whole interest of the insured in the property insured".
>
> "Sec. 2746. *One-third new for old.* In the case of a partial loss of a ship or its equipment, the old materials are to be applied towards payment for the new, and whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining cost of the repairs except that he must pay for anchors and cannon in full; and for sheathing metal at a depreciation of only two and one-half per cent for each month that it has been fastened to the ship".

In the specification for repairs (Exhibit "C"), it was provided "all old material to become the property of the contractor". What the value of this old material was does not appear anywhere in the record; but the allowance of the old materials to the contractor eliminates the deduction of the value of the old materials from the gross loss, determined by the bid for repairs.

If the work required to be performed and material required to be furnished under the surveyor's specifications were solely in the language of the policy, for "repairs attributable only to the perils insured against," and did not include "such repairs as are due only to wear and tear or the original

defects, natural decay or depreciation of the vessel,'' then in that case the appellants would be liable (under Sec. 2737 C. C. C.), if at all, for such proportion of the amount insured by them as the loss (after deducting one-third new for old) bears to the value of the whole interest of insured in the property insured. That is:

Cost of repairs	$14,027.00
One-third off new for old	4,675.66
Net loss to insured	$ 9,351.34
Valuation of whole interest	$15,000.00

Net loss is sixty-two and four-tenths of valuation of whole interest.

Assuming repairs attributable only to perils insured against, appellants' liability, if any, would be—(exclusive of interest and exclusive of their proportion of salvage charges):

1. Yang-Tsze 62 4/10% of $3,000. or $1,872 instead of $2,850. as per final decree.

2. Canton 62 4/10% of $4,000, or $2,496 instead of $3,800. as per final decree.

But were the repairs required in the specifications attributable *only* to perils insured against *or* attributable to those perils *and* also due to wear and

tear or original defects, natural decay or depreciation of the vessel?

The cost of repairing the vessel as shown by the bid, towit:—$14,027.00 is 93% of the value of the vessel as agreed upon in the policy and 82% of the cost of the vessel to libellant. When we consider that this vessel had not been in collision, had not stranded while under way, or otherwise met with violence, but had simply sunk at her moorings in a depth of water not sufficient to cover her, it is reasonable to assume that the specifications and the bid for repairs under those specifications covered not only items of repair attributable to the perils insured against but also items of repair due to wear and tear, natural decay, and, depreciation of the vessel which in December, 1907, at the time of her sinking, was sixteen years old.

The specifications call:

(1) for renewals of seventy items, among others, as follows: Steering gear, where necessary; *main deck, renewed from stem to stern;* stern, renewed from first scarph below main deck clean up; engine room, strongback and stanchion renewed; upholstered seats renewed in smoking room and ladies' cabin; curtain shades, linoleum renewed; individual chairs renewed; machinery; marine engines, etc.,

damaged and missing parts replaced by new; all steam and pressure gauges replaced by new; entire electric wiring throughout vessel to be replaced by new; and

(2) in addition to the renewals, for engineer's stores and tools and certain equipment and outfit *to be supplied.*

The report of the surveyors omits to discriminate between the repairs attributable only to the *perils* insured against and such repairs as were necessary from *wear and tear* or to the *original defects, natural decay or depreciation* of the vessel, which discrimination is expressly required in Rule VI for Adjustment of Marine Losses printed on the back of the policies in suit and expressly made a part of the contract of insurance by clause 3 in the body thereof; and which rule expressly provides: that insurers shall not be obliged to accept any adjustment on a vessel based on a survey which omits to make such discrimination.

The burden was on the appellee to see that a proper survey was made in order to recover, particularly where the surveyors are acting at the request of the owners.

Rule IX, of Rules for Adjustment of Marine Losses, above referred to, provides that the selection and appointment of surveyors shall be agreed upon beforehand by the assured and insurer or their representatives; and that no representative of the insurer shall be expected to certify, approve or accept any surveys made in contravention of this rule; but such documents shall be deemed to be wholly *ex parte* in character and as such open to criticism or liable to be rejected altogether.

Nor can a discrimination of repairs attributable to perils insured against and repairs due to wear and tear, original defects, natural decay or depreciation, be gathered from the bids for repairs submitted, which were two in number (Appellee's Exhibits "F" and "G") and were each in a lump sum for the requirements under the specifications.

Those Rules for Adjustment of Marine Losses further provide (Rule VII) that:

> "When bills for repairs are presented which include items indifferently specified—(and such are the bids for repairs based on the surveyor's specifications in the case at bar)—chargeable partly to owners and partly to underwriters, and having no reference to discriminations in the survey, the adjuster shall require the claimant or master to separate the charges in

accordance with the survey. Failure wherein, the adjuster shall refer the bill back to the maker thereof with a request to separate the items, so as to correspond with the survey. Failing in *both,* it shall be the custom to charge the *whole of the unspecified items* to the 'owner's' column.' "

The application of this rule requires the entire estimated cost of repair to be charged to "owner" for want of discrimination in the survey between repairs attributable only to the perils insured against and such repairs as are due only to wear and tear or to the original defects, natural decay or depreciation of the vessel; and also for want of such segregation in the bids for repairs.

Doubtless the surveyors, in making their report including specifications, were controlled by the intention, expressed to them, of libellant to abandon and claim as for a constructive total loss, when discrimination and segregation would be quite unnecessary. But the attempted abandonment (delayed until estimate of cost of repairs complete on April 15, 1908) has been adjudicated in the case at bar as untimely and the libellant put to the necessity of presenting a claim as for *partial loss.* This, however, does not relax the requirements of the Rules VI and VII as to discrimination and segregation.

The burden on the appellee has not been met or undertaken.

The Court cannot, from the record in this case, determine what discrimination and segregation should be made, and even though it should find the loss within the express warranties of the policies, the amount of such loss by reason of the perils insured against and the liability of appellants therefor under the policies cannot be ascertained.

The necessity of strictly applying the rules referred to is particularly obvious when it is remembered that the VASHON was built in 1891 and was therefore sixteen years old when she sustained the loss complained of. (See Certificate of Enrolment incorporated in Bill of Sale, Appellee's Exhibit "A".)

There is no evidence upon which to base a decree for a partial loss.

For these reasons we submit that the learned Court below erred in concluding libellant entitled to recover amount of policies, in directing a decree be entered and entering a decree in favor of libellant, and in not entering a decree dismissing the third amended libels.

(12th, 13th, 14th and 16th Assignments of Error.)

We submit that the decree of the Court below should be reversed with instructions to that court to dismiss the third amended libels with costs to appellants.

Respectfully submitted,

William H. Gorham,
Proctor for Appellants.